



Stephen Masciocchi

Partner
303.295.8451
Denver
smasciocchi@hollandhart.com



Tina Van Bockern

Partner
303.295.8107
Denver
trvanbockern@hollandhart.com

Tenth Circuit Reverses Denial of Asylum to Transgender Woman Under the Compulsion Standard

Insight — May 16, 2022

Law.com

The circuit court reversed the Board of Immigration Appeals' decision rejecting the petitioner's asylum claim, ruled that she was eligible for asylum, and remanded for the BIA to reconsider her claim. The decision is a rare example of a circuit court reversing a decision under the highly deferential compulsion standard.

In *Gonzales Aguilar v. Garland*, — F.4th —, 2022 U.S. App. LEXIS 8183 (March 29, 2022), the U.S. Court of Appeals for the Tenth Circuit, in a split decision, ruled that any reasonable adjudicator would have been compelled to find a pattern and practice of persecution against a transgender women in Honduras. The circuit court thus reversed the Board of Immigration Appeals' decision rejecting the petitioner's asylum claim, ruled that she was eligible for asylum, and remanded for the BIA to reconsider her claim. The decision is a rare example of a circuit court reversing a decision under the highly deferential compulsion standard.

Immigration Court and BIA Proceedings

Petitioner Kelly Gonzalez Aguilar is a transgender woman from Honduras who was born male and called Oscar. *Id.* at *2. From an early age, Oscar displayed many feminine qualities. When his mother left home for Mexico, Oscar went to live with his uncle, who beat him and expressed disgust for his feminine behavior. *Id.* When Oscar was 12 years old, he and his sister fled to Mexico to look for their mother, but Oscar suffered further abuse in Mexico. *Id.* at *3. They then came to the United States, where Oscar publicly identified as a woman, took hormonal treatments, wore female clothes, and changed her name to Kelly. *Id.*

The government brought removal proceedings, and Kelly sought asylum, withholding of removal, and deferral of removal. *Id.* At her hearing before the immigration judge, Kelly explained her fear of returning to Honduras as a transgender woman. *Id.* The judge found Kelly's testimony credible but denied asylum, withholding, and deferral. *Id.* She appealed, and a BIA member dismissed the appeal. *Id.* On the asylum claim, the BIA rejected her claims of past persecution and fear of future persecution. *Id.*

The Compulsion Standard

Both the majority and dissent began by articulating the applicable standard of review for the BIA's fact findings. As stated by the majority, "We consider the Board's factual findings [as] conclusive unless any reasonable adjudicator would be compelled to reach a contrary conclusion." *Id.* at *4 (citations and internal quotation marks omitted); see also *id.* at *25 (Carson, J., concurring in part and dissenting in part) ("Congress mandates that we reverse factual findings only when evidence is so compelling that no reasonable factfinder could find as the BIA did—a high bar indeed."). Though not cited in the majority opinion or the dissent, this "compulsion" standard is set forth in 8 U.S.C. §1252(b)(4)(B), which provides, "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary[.]"

The majority noted that in assessing the BIA's order, it could consult the immigration judge's opinion "to the extent the [BIA] relied upon or incorporated it." *Gonzales Aguilar*, 2022 U.S. App. LEXIS 8183, at *3-4 (quoting *Sarr v. Gonzales*, 474 F.3d 1197, 1204 (10th Cir. 2007)). As described below, the majority invoked the immigration judge's opinion in reserving the BIA on the issue of fear of future persecution.

The Majority Decision

The majority determined that the BIA erred in ruling that Kelly wasn't eligible for asylum. To be eligible, an applicant must prove refugee status, which she can do by proving "past persecution or a well-founded fear of future persecution." *Id.* at *4. For past persecution, the applicant must prove membership in a social group that was "at least one central reason" for the persecution. *Id.* at *5 (quoting 8 U.S.C. §1158(b)(1)(B)(i)). The majority initially ruled that (1) substantial evidence supported the immigration judge's finding that Kelly's gender identity wasn't a central reason for her past beatings by her uncle, and (2) she had not preserved her other theory of past persecution for appellate review. *Id.* at *5-7. It thus concluded that she failed to show past persecution based on gender identity. *Id.* at *7.

By contrast, the majority held that the BIA erred in rejecting Kelly's asylum claim based on a well-founded fear of future persecution. *Id.* Such a fear has subjective and objective elements: "(1) a genuine, subjective fear of persecution that is (2) objectively reasonable based on credible, direct, and specific evidence in the record." *Id.* at *7-8 (citations and internal quotation marks omitted). For the second element, applicants must show "a reasonable probability of future persecution," which can exist even if the chance of persecution is as little as 10%. *Id.* at *8. Fears are objectively reasonable if "based on membership in a social group subject to a pattern or practice of persecution in the country of removal." *Id.* (citation and internal quotation marks omitted).

Because the BIA didn't explain its rationale for ruling that Kelly hadn't demonstrated a pattern or practice of persecution against transgender persons, the majority consulted the immigration judge's decision. The judge acknowledged the hardships faced by transgender women in Honduras but noted that the government had enacted anti-discrimination laws and had prosecuted some individuals who had committed crimes

against transgender persons. *Id.* at *8-9. The judge concluded that transgender persons thus didn't face “systemic or pervasive persecution.” *Id.* at *9.

The majority disagreed. It cited extensive record evidence of violence against transgender persons that was “so widespread any reasonable adjudicator would find a pattern or practice of persecution against transgender women in Honduras.” *Id.* Among other things, the majority relied on expert declarations, the State Department's 2016 Country Report, and reports from various commissions documenting widespread violence against and killings of lesbian, gay, bisexual, and transgender people. *Id.* at *9-11. Equally important, the majority observed that the Honduran government's anti-discrimination laws and its efforts to curb violence against transgender individuals and prosecute wrongdoers had been ineffective. *Id.* at *15-20. Among many other problems, military police and security forces themselves had harassed and abused members of the lesbian, gay, bisexual, and transgender community. *Id.* at *12-13. Finally, the majority distinguished or criticized out-of-circuit case relied on by the dissent, where courts either did not rule on the merits of asylum claims, applied different standards, or only pointed to the measures by Honduran authorities to investigate crimes without evaluating whether those methods were effective. See *id.* at *20-24.

The majority thus reversed the BIA's decision that Kelly wasn't eligible for asylum. And it remanded for the BIA to determine not only whether to grant asylum to Kelly, but whether she was entitled to withholding of removal or deferral of removal—remedies the BIA rejected because she was deemed ineligible for asylum. *Id.* at *24-25.

The Dissent

Judge Carson dissented. He shared the majority's concern over Kelly's unquestionable suffering and the plight she faced, but in his view, the evidence did not overcome the “high bar” set by the compulsion standard. *Id.* at *25. He opined that substantial evidence supported the BIA's ruling that Kelly had not established a well-founded fear of persecution. *Id.* He noted that Honduras had responded to violence against LGBT persons by enacting laws, prosecuting those accused of killing such persons, training its national security force to protect them, and creating a task force to investigate these crimes. *Id.* at *26. He also relied on out-of-circuit cases and asked rhetorically, “Given that other reasonable jurists throughout the country have affirmed similar BIA decisions with similar evidence in the record, how does the majority reach a different result?” Ultimately, he agreed one *could* view the record differently than the BIA and *might* reach a different conclusion on de novo review, but he concluded, “I cannot say that any reasonable adjudicator would be compelled to reject the immigration judge's findings[.]” *Id.* at *32.

Stephen Masciocchi and Tina Van Bockern are attorneys in Holland & Hart's Denver office. Steve leads the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class

actions. Tina helps clients appeal federal agency regulations, decisions, and orders, as well as unfavorable trial court judgments in a variety of substantive areas.

Reprinted with permission from the May 16, 2022 online edition of Law.com © 2022 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.